IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER,

Plaintiff,

v.

MATTHEW CATE, et al.,

Defendants.
_____/

No. 09-02948 CW

ORDER REVIEWING FIRST AMENDED COMPLAINT UNDER 28 U.S.C. § 1915A, ORDERING SERVICE OF COGNIZABLE CLAIMS AND DISMISSING NON-COGNIZABLE CLAIMS

On June 30, 2009, Plaintiff, an inmate at Pelican Bay State Prison (PBSP), filed this civil rights complaint against several Defendants alleging, among other things, an Eighth Amendment claim for deliberate indifference to his serious medical needs and a state medical malpractice claim. On February 16, 2010, this Court issued an Order Reviewing Complaint Under 28 U.S.S. § 1915A and found that Plaintiff had stated a cognizable Eighth Amendment claim against Defendants James Flowers, Sue Risenhoover, Michael Sayre and Maureen McLean and that he had stated a cognizable medical malpractice claim against the aforementioned Defendants and Defendants Pam Labans and R. Robinson. The Court dismissed with leave to amend Plaintiff's Eighth Amendment claim against Defendants Matthew Cate, Francisco Jacquez, Pam Labans, R. Robinson, and Dwight Winslow and the negligence claim against Defendants Cate, Jacquez and Winslow. Plaintiff has filed a First Amended Complaint (FAC) seeking to state an Eighth Amendment claim against these Defendants. The Court reviews the FAC under 28

U.S.C. § 1915A.

LEGAL STANDARD

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of "deliberate indifference" involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. Id.

A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Id. (citing Estelle, 429 U.S. at 104). The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of

indications that a prisoner has a "serious" need for medical treatment. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

A prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but he "must also draw the inference." Id. If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk. Gibson v. County of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).

In order for deliberate indifference to be established, therefore, there must be a purposeful act or failure to act on the part of the defendant and resulting harm. McGuckin, 974 F.2d at 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). A finding that the defendant's activities resulted in "substantial" harm to the prisoner is not necessary, however.

Once the prerequisites are met, it is up to the fact-finder to determine whether deliberate indifference was exhibited by the defendant. Such indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison officials provide medical care. McGuckin, 974 at 1062.

DISCUSSION

In the February 16, 2010 Order, the Court found that Plaintiff had alleged that he had a serious medical need. Whether Plaintiff has a cognizable claim against a particular Defendant for violation of the Eighth Amendment due to deliberate indifference depends on the nature of the Defendant's response to that need. The following are Plaintiff's new allegations against Defendants.

I. Matthew Cate

Defendant Cate is the Secretary-Director of the California Department of Corrections and Rehabilitation (CDCR). On February 1, 2008, Defendant Cate denied Plaintiff's 602 Appeal #07-11142 which addressed the alleged unconstitutional medical care PBSP medical staff had provided to Plaintiff. On July 21, 2008, Defendant Cate denied another 602 appeal addressing the ongoing alleged unconstitutional medical treatment. On January 13, 2009, Plaintiff sent another 602 appeal to Defendant Cate. Although appeals are supposed to be reviewed and decided within sixty days, it was not until December 16, 2009 that Defendant Cate responded by denying the appeal.

In the February 16, 2010 Order, the Court dismissed the claims against Defendant Cate because "the only specific allegations concerning Defendant Cate are his failure to grant Plaintiff's 602 appeals. These allegations do not state a cognizable claim."

The allegations against Defendant Cate in the FAC are also that he failed to grant Plaintiff's 602 appeals. As stated previously, these allegations do not state a cognizable claim. Therefore, all claims against Defendant Cate are dismissed.

II. Francisco Jacquez and Dwight Winslow

The FAC does not make any allegations against Defendants Jacquez and Winslow. Therefore, all claims against them are dismissed.

III. Pam Labans and R. Robinson

Defendants Labans and Robinson are registered nurses employed by PBSP. On March 19, 2008, they denied, at the first level of review, Plaintiff's January 14, 2008 602 appeal regarding his alleged unconstitutional medical treatment. As stated in the February 16, 2010 Order, there is no cognizable claim for the denial of a 602 appeal. Therefore, Plaintiff's allegations against Labans and Robinson fail to state a cognizable Eighth Amendment claim.

CONCLUSION

Based on the foregoing and the February 16, 2010 Order, Plaintiff has stated the following cognizable claims for relief:

1. An Eighth Amendment claim for deliberate indifference to serious medical needs against Defendants Flowers, Risenhoover, Sayre and McLean.

2. A state law claim in negligence for breach of a professional duty of care against Defendants Flowers, Risenhoover, Sayre, McLean, Labans and Robinson.

3. All other claims against all other Defendants are dismissed.

Because it appears that Plaintiff has not served his original complaint on Defendants, the following, which was stated in the Court's February 16, 2010, remains applicable.

4. Because Plaintiff is not proceeding in forma pauperis in this action, he may not rely on the United States Marshal for service of the summons, complaint and First Amended Complaint without paying for this service. See Fed. R. Civ. P. 4(c)(3). Title 28 U.S.C. § 1921(a)(A) provides that the United States Marshal shall routinely collect, and the court may tax as costs, fees for serving a summons and complaint. Title 28 C.F.R. § 0.114(a)(3) provides that the United States Marshal shall collect a fee for personal service of a summons and complaint at the rate of $55.00 per hour, or portion thereof, plus travel expenses. Consequently, Plaintiff may himself arrange for service of all of the Defendants against whom cognizable claims for relief have been found or he may request the Court to order the Marshal to do so. If Plaintiff wishes the Marshal to serve the summons and complaint, he must inform the Court of this within twenty days of the date of this Order and he must arrange to pay the required fee. Rule 4(m) of the Federal Rules of Civil procedure provides:

> If service and summons of a complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time . . .

Fed. R. Civ. P. 4(m).

5. Alternatively, Plaintiff may accomplish service of Defendants pursuant to Federal Rule of Civil Procedure 4(d) which provides that plaintiffs may send to the defendants a notice that they are being sued and a request that they waive service of a summons. The notice must be in writing, addressed to the

individual defendants, name the court where the complaint was filed, be accompanied by a copy of the complaint and amended complaint, two copies of the waiver form, and a prepaid means for returning the form, be sent by first class mail or other reliable means, state the date the request was sent and give the defendant a reasonable time, at least thirty days after the request was sent, to return the waiver. See Fed. R. Civ. P. 4(d)(1)(A)-(G). The Clerk shall mail to Plaintiff sufficient copies of the Court's official "Waiver of Service of Summons" forms.

6. If Plaintiff asks that Defendants waive service, Defendants are cautioned that Rule 4(d) requires them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant to Rule 4(d)(2), if Defendants, after being notified of this action and requested by Plaintiff to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause be shown for their failure to sign and return the waiver form. If service is waived, this action will proceed as if Defendants had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(A)(ii), Defendants will not be required to serve and file an answer before sixty (60) days from the date on which the request for waiver was sent. (This allows a longer time to respond than would be required if formal service of summons is necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that more completely describes the duties of the parties with regard to waiver of service of the summons. If service is waived after the date provided in the Notice but before Defendants have been

personally served, the Answer shall be due sixty (60) days from the date on which the request for waiver was sent or twenty (20) days from the date the waiver form is filed, whichever is later.

7. Defendants shall answer the complaint in accordance with the Federal Rules of Civil Procedure. The following briefing schedule shall govern dispositive motions in this action:

a. No later than ninety (90) days from the date their answer is due, Defendants shall file a motion for summary judgment or other dispositive motion. The motion shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56. If Defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the Court prior to the date the summary judgment motion is due. All papers filed with the Court shall be promptly served on Plaintiff.

b. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than sixty (60) days after the date on which Defendants' motion is filed. The Ninth Circuit has held that the following notice should be given to pro se plaintiffs facing a summary judgment motion:

> The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.
>
> Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case.

> When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that because he bears the burden of proving his allegations in this case, he must be prepared to produce evidence in support of those allegations when he files his opposition to Defendants' dispositive motion. Such evidence may include sworn declarations from himself and other witnesses to the incident, and copies of documents authenticated by sworn declaration. Plaintiff will not be able to avoid summary judgment simply by repeating the allegations of his complaint.

c. If Defendants wish to file a reply brief, they shall do so no later than thirty (30) days after the date Plaintiff's opposition is filed.

d. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

8. Discovery may be taken in this action in accordance with the Federal Rules of Civil Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose Plaintiff and any other necessary witnesses confined in prison.

9. All communications by Plaintiff with the Court must be served on Defendants, or Defendants' counsel once counsel has been designated, by mailing a true copy of the document to Defendants or Defendants' counsel.

10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion.

11. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than seven days prior to the deadline sought to be extended.

12. The Court orders the Clerk of the Court to send this Order to PBSP Litigation Coordinator Harlan Watkins and to the California Attorney General and to mail courtesy copies to each Defendant so that Defendants have prior notice of this lawsuit and of the consequences if they fail to waive formal service and require service by the United States Marshal.

IT IS SO ORDERED.

Dated: June 1, 2010

CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER,

Plaintiff,

v.

MATHEW CATE et al,

Defendant.
_____/

Case Number: CV09-02948 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 1, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Todd Ashker C58191
D1-119
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532

Dated: June 1, 2010

Richard W. Wieking, Clerk
By: Ronnie Hersler, Administrative Law Clerk